

National Pollutant Discharge Elimination System (NPDES) State Legal Authority Review Checklist

11/17/03 **Draft**

I. PRE-REVIEW INFORMATION/ FILE INVENTORY

A. *Program Authorization History:*

1. Base NPDES Program:

Date Authorized: _____

State Agency Authorized to Administer Program: _____

2. Does the program authorization record include a copy of the approval of the State's Continuing Planning Process (CPP) at the time of original program authorization? _____ Yes
_____ No

3. In addition to the Base NPDES Program, what other parts or revisions to the NPDES program has the State adopted regulations to implement and for which it obtained approval from EPA?

Additional Program Modification/ Regulatory Revisions	Date authorized	State Agency Authorized to Administer Program	Relevant State law(s) & regulation(s) (include general provisions only , e.g., 40 CFR Part 403 for pretreatment program; detailed citations are needed in the rest of the checklist)
Pretreatment			
General permits			
Federal Facilities			
Biosolids (sludge)*			
Storm water (MS4, construction, industrial)?			

CAFOs			
Great Lakes Guidance (Great Lakes States only)			
316(b)			
Other (describe)			

Comments: Please note here whether any of the above were partial program modification, with additional elements expected to phase-in over time and when those elements are expected to phase-in.

**Note to Reviewers: State NPDES programs are not required to obtain authorization of a biosolids program, although some have opted for this authorization (OK, TX, UT, SD, WI) Regulations relevant to biosolids permitting are scattered throughout the NPDES regulations. If a State does not have an approved biosolids program, omission of provisions related to biosolids is not a deficiency.*

B. Post-Approval Legal Authority Review History

Program Element	Date of review	Reviewing Party	Note: Any findings that are still relevant (i.e., not resolved) should be incorporated into the checklist; Here describe the outcome of the review, e.g., sent to Region, sent to State, legal authority changes by the State approved by EPA, etc.
Please note scope of program reviewed, e.g., general revisions to NPDES regulations, Storm water, CAFOs, etc.			

C. Transfer of Program Responsibilities to Another State Agency [For States to Fill Out]

Has the State transferred any program responsibilities to a different agency than the one identified during the initial program authorization or subsequent program modifications? _____ Yes _____ No

If yes, please describe _____

D. Legal Authority Revisions That Have Not Been Submitted to EPA [For States to Fill Out]

Please list all currently effective revisions to the regulations governing the State's NPDES program that have been adopted since initial program authorization but not submitted to EPA for review and approval.

Cite	Effective Date	Brief Description

E. Memorandum of Agreement (MOA) Information:

1. *Original NPDES Program Authorization MOA:*

Date Signed: _____

Date Effective: _____

2. *Has the State ever needed to revise the original MOA?* [Note: Please include all MOAs or MOA addenda that affect NPDES program implementation, e.g., jurisdiction over discharges in Indian Country, ESA Consultation, NHPA Consultation, DOE, Other (CAFO, GLI, mining, storm water, etc.)]

MOA Revisions	Reason for Revision	Date Signed	Effective Date	Signatory Parties	Applicable Federal/State law and/or regulation
#1					
#2					
#3					

F. Statement of the State Attorney General (AG):

1. *Original NPDES Program Authorization State Attorney General Statement:*

Date Signed: _____

Date Effective: _____

2. *Does the State AG Statement address any State activities on Indian lands [40 CFR §123.23(b)]?*

YES _____ NO _____

If yes, please describe: _____

3. *Has your State ever needed to revise or supplement the original State AG Statement?*

State AG Statement Revisions	Reason for Revision or Supplemental Provisions	Date Signed	Effective Date	Applicable Federal/State law and/or regulation
#1				
#2				
#3				

II. NPDES REGULATIONS: Required State Legal Authorities and Related Requirements

A. *Introduction*

States must have legal authority to implement the provisions described in Parts II and III of this checklist. See generally 123.25 and 403.10(f). States may omit or modify a provision if the effect is to impose a more stringent requirement. Where generally applicable, we have indicated, below or in Appendix 1, whether omission of a revised regulation would make the state program more stringent and therefore its absence would not be considered a deficiency in a state's required legal authorities.

You will need a copy of the regulations (40 CFR Parts 122-125) for this review. In many instances, referenced regulations are paraphrased or only briefly described in the checklist and you will need the full text of the regulation to evaluate the adequacy of a state provision(s).

Appendix 1 is a list of major revisions to the federal NPDES regulations since the 1987 amendments to the CWA that State programs must be able to implement (i.e., included in the list at 40 CFR 123.25 and elsewhere in Part 123). This Appendix lists regulations that are included in the checklist. We are providing this as a reference to readily identify when new requirements came into being.

B. *Source and Date of Materials Reviewed* (e.g., state website, hard copy obtained from Region or State) Please list documents and other materials used in this review

Effective Date	Source

C. *Overarching Issues*

1. *Incorporation by Reference:* Many States adopt federal regulations by reference. When this happens, please characterize the scope.
 - a. Does it ___ generally or ___ specifically identify which federal regulations are being incorporated?
 - b. Does the incorporation cover ___ only the federal regulations in effect at the time of the incorporation or ___ current and future changes to federal regulations? ___ unknown
 - c. Does the Attorney General's Statement address incorporation by reference issues, particularly prospective incorporation ___ Yes ___ No
 - d. If addressed in the Attorney General's Statement, what are major conclusions?

2. *General Rules of Interpretation:* Does the State have general rules of interpretation such as:

- a. A prohibition against state provisions that are more stringent than federal requirements?
_____ Yes _____ No

Cite: _____

- b. Provision stating that state regulations should be interpreted consistent with federal requirements?
_____ Yes _____ No

Cite: _____

- c. Other?
_____ Yes _____ No

If yes, please provide cite and language _____

D. Regulations Addressing Permit Development

1. 40 CFR §122.2 - Definitions

Note to reviewers: 122.2 contains numerous definitions (See attachment 2) . Please focus review on the ones listed below, which relate to the jurisdictional boundaries of the program. Please also identify state definitions that have no federal counterpart and are related to substantive requirements.

a. 40 CFR §122.2 - Discharge of a Pollutant

Discharge of a pollutant means:

- (a) Any addition of any "pollutant" or combination of pollutants to "waters of the United States" from any "point source," or
- (b) Any addition of any pollutant or combination of pollutants to the waters of the "contiguous zone" or the ocean from any point source other than a vessel or other floating craft which is being used as a means of transportation. This definition includes additions of pollutants into waters of the United States from: surface runoff which is collected or channeled by man; discharges through pipes, sewers, or other conveyances owned by a State, municipality, or other person which do not lead to a treatment works; and discharges through pipes, sewers, or other conveyances, leading into privately owned treatment works. This term does not include an addition of pollutants by any "indirect discharger."

State Regulation/Law Citation:

Comments:

b. 40 CFR §122.2 - Point Source

Point source means any discernible, confined, and discrete conveyance, including but not limited to, any pipe, ditch, channel, tunnel, conduit, well, discrete fissure, container, rolling stock, concentrated animal feeding operation, landfill leachate collection system, vessel or other floating craft from which pollutants are or may be discharged. This term does not include return flows from irrigated agriculture or agricultural storm water runoff. (See § 122.3).

State Regulation/Law Citation:

Comments:

c. 40 CFR §122.2 - Pollutant

Pollutant means dredged spoil, solid waste, incinerator residue, filter backwash, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials (except those regulated under the Atomic Energy Act of 1954, as amended (42 U.S.C. 2011 et seq.)), heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water. It does not mean:

(a) Sewage from vessels; or

(b) Water, gas, or other material which is injected into a well to facilitate production of oil or gas, or water derived in association with oil and gas production and disposed of in a well, if the well used either to facilitate production or for disposal purposes is approved by authority of the State in which the well is located, and if the State determines that the injection or disposal will not result in the degradation of ground or surface water resources.

Note: Radioactive materials covered by the Atomic Energy Act are those encompassed in its definition of source, byproduct, or special nuclear materials. Examples of materials not covered include radium and accelerator-produced isotopes. See *Train v. Colorado Public Interest Research Group, Inc.*, 426 U.S. 1 (1976).

State Regulation/Law Citation:

Comments:

d. 40 CFR §122.2 - Waters of the US

Waters of the United States or waters of the U.S. means:

(a) All waters which are currently used, were used in the past, or may be susceptible to use in interstate or foreign commerce, including all waters which are subject to the ebb and flow of the tide;

(b) All interstate waters, including interstate "wetlands;"

(c) All other waters such as intrastate lakes, rivers, streams (including intermittent streams), mudflats, sandflats, "wetlands," sloughs, prairie potholes, wet meadows, playa lakes, or natural ponds the use, degradation, or destruction of which would affect or could affect interstate or foreign commerce including any such waters:

(1) Which are or could be used by interstate or foreign travelers for recreational or other purposes;

(2) From which fish or shellfish are or could be taken and sold in interstate or foreign commerce; or

(3) Which are used or could be used for industrial purposes by industries in interstate commerce;

(d) All impoundments of waters otherwise defined as waters of the United States under this definition;

(e) Tributaries of waters identified in paragraphs (a) through (d) of this definition;

(f) The territorial sea; and

(g) "Wetlands" adjacent to waters (other than waters that are themselves wetlands) identified in paragraphs (a) through (f) of this definition. Waste treatment systems, including treatment ponds or lagoons designed to meet the requirements of CWA (other than cooling ponds as defined in 40 CFR 423.11(m) which also meet the criteria of this definition) are not waters of the United States. This exclusion applies only to manmade bodies of water which neither were originally created in waters of the United States (such as disposal area in wetlands) nor resulted from the impoundment of waters of the United States. [See Note 1 of this section.] Waters of the United States do not include prior converted cropland. Notwithstanding the determination of an area's status as prior converted cropland by any other federal agency, for the purposes of the Clean Water Act, the final authority regarding Clean Water Act jurisdiction remains with EPA.

State Regulation/Law Citation:

Comments:

e. State Definitions without Federal Counterpart

Note to Reviewers: Please provide language of state definitions that have no federal counterpart.

State Regulation/Law Citation:

Comments:

2. 40 CFR §122.3 - Exclusions

Note to Reviewers: States are not required to have any of the exclusions listed at 122.3. However, if they do have exclusions, they must be consistent with 122.3. Please provide language for any exclusion in state legal authorities that differs from or has no federal counterpart.

State Regulation/Law Citation:

Comments:

3. 40 CFR § 122.4 - Prohibitions

Description:

No permit may be issued:

- \$ when conditions don't provide for compliance with CWA and regulations
- \$ when the Regional Administrator has objected to a permit under 123.44
- \$ when imposition of conditions cannot ensure compliance with water quality requirements of all affected states
- \$ when the Secretary of the Army, acting through the Corps of Engineers, determines that anchorage or navigation would be substantially impaired by the discharge
- \$ for the discharge of an radiological, chemical, or biological warfare agent or high-level radioactive waste
- \$ when there is insufficient information to determine if the discharge would comply with guidelines under CWA §403(c)[relating to degradation of the territorial seas, the contiguous zone, and oceans]
- \$ to a new source or new discharge if the discharge from its construction or operation will cause or contribute to the violation of water quality standards.*****

State Regulation/Law Citation:

Comments:

4. 40 CFR § 122.5 - Effect of a Permit

Description

- \$ Except for effluent standards and prohibitions under CWA §307 and 405(d) sewage sludge use and disposal standards, compliance with a permit during its term constitutes compliance with CWA §§301, 302, 306, 307, 318, 403, and 405(a)-(b) (the "permit shield").
- \$ A permit may be modified, revoked and reissued, or terminated for cause [See §§122.62 and 122.64]
- \$ Issuance of a permit does not convey any property rights of any sort, or any exclusive privilege.

State Regulation/Law Citation:

Comments:

5. 40 CFR § 122.7 - Confidentiality of Information

Confidentiality must be denied for:

- § name and address of any permit applicant or permittee
- § permit applications, permits, and effluent data
- § information required by permit application forms

State Regulation/Law Citation:

Comments:

6. 40 CFR §122.46 - Duration of Permits

Description:

- § Permits must be for fixed term not to exceed 5 years
- § Shorter term is at the discretion of Director

State Regulation/Law Citation:

Comments:

7. 40 CFR §122.21 - Application for a Permit

Description:

- \$ (a)(1) Duty to apply;
- \$ (a)(2) State equivalent of EPA permit application forms;
- \$ (b) Who applies;
- \$ (c) Time to apply - at least 180 days before the discharge commences;
- \$ (d) Duty to reapply - at least 180 days before the current permit is set to expire; (90 days before start of construction for SW construction discharges)
- \$ (f) Information requirements;
- \$ (g) Application requirements for existing manufacturing, commercial, mining, and silvicultural dischargers;
- \$ (h) Application requirements for manufacturing, commercial, mining and silvicultural facilities which discharge only non-process wastewater;
- \$ (i) Application requirements for new and existing concentrated animal feeding operations and aquatic animal production facilities;
- \$ (j) Application requirements for new and existing POTWs;
- \$ (k) Application requirements for new sources and new discharge;
- \$ (l) Special provisions for applications from new sources;
- \$ (m) Variance requests by non-POTWs;
- \$ (n) Variance requests by POTWs;
- \$ (o) Expedited variance procedures and time extensions;
- \$ (p) Record keeping - Requirement for the permittee to retain records for three years; and
- \$ (q) Sewage sludge management (N/A to states that don't have approved sludge programs)

State Regulation/Law Citation:

Comments:

8. 40 CFR §122.22 - Signatories to Permit Applications and Reports

Description:

- \$ Signature requirements for corporations, partnerships, municipalities, and public agencies and requirements for changes in authorization.

State Regulation/Law Citation:

Comments:

9. 40 CFR §122.23 - Concentrated Animal Feeding Operations (CAFOs)

Description:

- § A CAFO is a facility that meets certain thresholds for different types of animals and discharges pollutants into navigable waters or the waters of the US. There are large, medium and small CAFOs
- § An animal feeding operation may be designated as a CAFO (a point source) on a case-by-case basis if it is determined to be a significant contributor of pollutants to waters of the U.S. after an on-site inspection and consideration of several factors. (A designated CAFO is called a "small CAFO.")

Note to reviewers: EPA promulgated revisions to NPDES regulations for CAFOs on February 12, 2003. States have one or two years from the effective date of the rule (April 14, 2003) to make any necessary changes to their legal authorities (1 year if only regulations are needed; 2 years if statutory changes are needed). The review should focus on what changes to its legal authority a state may need to make to be consistent with the new CAFO regulations. See Appendix 1 for a detailed listing of the new CAFO regulations

State Regulation/Law Citation:

Comments:

10. 40 CFR §122.24 (including Appendix C) - Concentrated Aquatic Animal Production Facilities

Description:

- § A concentrated aquatic animal production is a facility which harvests over 20,000 pounds of cold water fish per year and feeds over 5,000 pounds of food per month to cold water fish. Or, a concentrated aquatic animal production is a facility which harvests more than 100,000 pounds of warm water fish.
- § An aquatic animal facility may be designated as a concentrated aquatic animal production facility (a point source) on a case-by-case basis. A permit application is not required until an inspection has been conducted to determine if it falls under the permit program.

State Regulation/Law Citation:

Comments:

11. 40 CFR §122.25 and 40 CFR §125, Subpart B - Aquaculture Projects

Description:

- \$ The Director may issue permits only if: the crop has a commercial value, the pollutant applied will result in an increased harvest, there will be minimal adverse effects on the flora and fauna indigenous to the area, the crop will not have a significant potential to harm human health, and the migration of pollutants to water outside the project area will not contribute to a violation of water quality standards.
- \$ No permits will be issued if they will conflict with a plan approved under Section 208(b) of the Act.
- \$ No permits will be issued for a project located in the territorial sea, the waters of the contiguous zone, or the ocean, except under the guidelines of section 403(c).
- \$ Project areas shall not expose a substantial portion of the indigenous biota to conditions within the project area.
- \$ Any construction for the project area shall not unduly alter the tidal regimen.
- \$ 40 CFR §125 Subpart B - Technical standards

State Regulation/Law Citation:

Comments:

12. Storm Water Discharges

a. 40 CFR §122.26 - Storm Water Discharges

Description:

(a) Permits are required for: those permitted before Feb. 4, 1987, discharges associated with industrial activity (including construction projects ≥5 acres), large and medium separate storm sewer systems (MS4s), and discharges determined to cause or contribute to a violation of WQS or a significant contributor of pollutants

(b) Definitions- Key definitions include "municipal separate storm sewer system" and "storm water discharges associated with industrial activity."

(c) - Application requirements for industrial activities and small construction - Facilities are required to apply for coverage under an individual permit or seek coverage under a general permit. Facilities requesting coverage under an individual permit have specific requirements, as detailed in Form 2F.

(d) - Application requirements for medium and large MS4s - Must submit a two part application for coverage under an MS4 permit. These applications were all due no later than May 17, 1993. These applications were to address legal authority, source identification, discharge characterization, management programs, an assessment of controls, and fiscal resources.

(e) - Application deadlines - Persons required to obtain coverage under a storm water permit must meet certain application due dates as specified.

(f) - Petitions - Various petition opportunities exist for MS4 operators and others to clarify/modify certain permit requirements, as identified.

(g) - No Exposure Conditional Exclusion - Discharges composed entirely of storm water are not storm water discharges associated with industrial activity if there is "no exposure" of industrial materials and activities to rain, snow, snowmelt and or runoff. Facilities may qualify for this exclusion by certifying to certain eligibility provisions.

State Regulation/Law Citation:

Comments:

b. 40 CFR §122.32 As an operator of a small MS4, am I regulated under the NPDES storm water program?

- (a) Unless you qualify for a waiver under paragraph (c)... you are regulated if you operate a small MS4,... and:
- (1) ...are located in an urbanized area; or
 - (2) ...are designated by the NPDES permitting authority.
- (b) ...petition to the NPDES permitting authority to require an NPDES permit...
- (c) The NPDES permitting authority may waive the requirements if you meet conditions in (d) or (e).
- (d) The NPDES permitting authority may waive permit coverage if your MS4 serves a population of less than 1,000 within the urbanized area and:
- (1) ...not contributing substantially to the pollutant loadings of a regulated, physically interconnected MS4...; and
 - (2) ...storm water controls are not needed based on waste load allocations that are part of an EPA approved or established "total maximum daily load" (TMDL) that addresses the pollutant(s) of concern.
- (e) The NPDES permitting authority may waive permit coverage if your MS4 serves a population under 10,000 and you meet the following criteria:
- (1) The permitting authority has evaluated all waters of the U.S., including small streams, tributaries, lakes, and ponds, that receive a discharge from your MS4;
 - (2) ...the permitting authority has determined that storm water controls are not needed based on waste load allocations that are part of an EPA approved or established TMDL that addresses the pollutant(s) of concern or... an equivalent analysis...;
 - (3) ...the pollutant(s) of concern include biochemical oxygen demand (BOD), sediment or a parameter that addresses sediment (such as total suspended solids, turbidity or siltation), pathogens, oil and grease, and any pollutant that has been identified as a cause of impairment of any water body that will receive a discharge from your MS4; and
 - (4) The permitting authority has determined that future discharges from your MS4 do not have the potential to result in exceedances of water quality standards...

State Regulation/Law Citation:

Comments:

c. 40 CFR §122.33 If I am an operator of a regulated small MS4, how do I apply for an NPDES permit and when do I have to apply?

- (a) If you operate a regulated small MS4 under §122.32, you must seek coverage under a NPDES permit issued by your NPDES permitting authority.
- (b) You must seek authorization to discharge under a general or individual NPDES permit, as follows:
- (1) Under a general permit ...you must submit a Notice of Intent (NOI)... that describes which minimum measures you will implement and identify the entities that will implement the other minimum measures within the area served by your MS4.
 - (2)(i) & (ii) Application requirements for individual permittees. Different requirements under each subparagraph.
 - (iii) Co-permittees under an individual permit.
 - (3) Permit requirements as a limited co-permittee with a medium or large MS4.
- (c) If you operate a regulated small MS4:
- (1) ...for those regulated pursuant to 122.32(a)(1): you must apply for coverage under an NPDES permit... by March 10, 2003, unless your MS4 serves a jurisdiction with a population under 10,000 and the NPDES permitting authority has established a phasing schedule under §123.35(d)(3) of this chapter.
 - (2) ... for those regulated pursuant to 122.32(a)(2): you must apply for coverage under an NPDES permit... within 180 days of notice, unless the NPDES permitting authority grants a later date.

State Regulation/Law Citation:

Comments:

d. 40 CFR §122.34 As an operator of a regulated small MS4, what will my NPDES MS4 storm water permit require?

Description:

(a) - Small MS4 NPDES permit requires you develop, implement, and enforce a storm water management program designed to reduce the discharge of pollutants to the maximum extent practicable, to protect water quality, and to satisfy the appropriate water quality requirements of the CWA.

(b)(1) - Minimum Control Measure(MCM) - Public education and outreach on storm water impacts -

(b)(2) - MCM - Public involvement/participation - must comply with state, tribal, and local public notice requirements

(b)(3) - MCM - Illicit discharge detection and elimination

(b)(4) - MCM - Construction site storm water runoff control

(b)(5) - MCM - Post-construction storm water management in new development and redevelopment

(b)(6) - MCM - Pollution prevention/good housekeeping for municipal operations

(d) - Your permit application or NOI must include: (i) BMPs that will be implemented for each of the minimum control measures, (ii) the measurable goals for each of the BMPs, including, as appropriate, the months and years in which you will undertake the required actions, including the interim milestones and frequency of the action, and (iii) the person or persons responsible for implementing and coordinating your storm water management program.

(e) - You must comply with any more stringent effluent limitations in your permit.

(f) You must comply with other applicable NPDES permit requirements.

(g) Evaluation and assessment –

(1) Evaluate program compliance, appropriateness of BMPs, and progress towards achieving measurable goals.

(2) Record keeping. You must keep records required by the NPDES permit for at least 3 years and make records available to the public at reasonable times during regular business hours .

(3) Reporting. ...you must submit annual reports to the NPDES permitting authority for your first permit term (and after first permit term, you must submit reports in year 2 and 4 unless required more frequently). Your report must include:

(i) The status of compliance... the appropriateness of your identified best management practices and progress towards achieving your identified measurable goals.

(ii) Results of information collected and analyzed;

(iii) A summary of the storm water activities you plan to undertake during the next reporting cycle;

(iv) A change in any identified best management practices or measurable goals for any of the minimum control measures; and

(v) Notice that you are relying on another governmental entity to satisfy some of your permit obligations (if applicable).

State Regulation/Law Citation:

Comments:

e. 40 CFR §122.35 As an operator of a regulated small MS4, may I share the responsibility to implement the minimum control measures with other entities?

- (a) You may rely on another entity to satisfy your NPDES permit obligations to implement a minimum control measure if:
- (1) The other entity, in fact, implements the control measure;
 - (2) The particular control measure, or component thereof, is at least as stringent as the corresponding NPDES permit requirement; and
 - (3) The other entity agrees to implement the control measure on your behalf. In the reports you must submit under §122.34(g)(3), you must also specify that you rely on another entity to satisfy some of your permit obligations.
- (b) ... you are not required to include such minimum control measure(s) in your storm water management program [where] another governmental entity is responsible under an NPDES permit for implementing one or more of the minimum control measures for your small MS4.

State Regulation/Law Citation:

Comments:

13. 40 CFR §122.27 - Silvicultural Activities

Description:

§ Permit requirements for any point source that is a part of a rock crushing, gravel washing, log sorting or log storage facility. Facilities that do not have point sources, such as nurseries, site preparation, reforestation, surface drainage, or road construction are excluded.

State Regulation/Law Citation:

Comments:

14. 40 CFR §122.28 - General Permits

Description:

§ The Director may issue a general permit in lieu of an individual permit upon consideration of area, sources, water quality-based limits, and other requirements. General permits may be issued, modified, revoked and reissued, or terminated in accordance with applicable requirements of Section 124 or corresponding state regulations.

State Regulation/Law Citation:

Comments:

15. 40 CFR §122.41 - Conditions Applicable to All Permits

Description:

- (a) **Duty to Comply.** Any permit noncompliance is a violation of the CWA and is grounds for enforcement action. The permittee shall comply with effluent standards or prohibitions under Section 307(a) of the CWA for toxic pollutants and with standards for sewage sludge use or disposal.
- (b) - **Duty to Reapply** Permittees must reapply for a permit if they want to continue the permitted activity after expiration of the permit.
- (c) - **Need to Halt or Reduce Activity Not a Defense** When a permittee is under an enforcement action, claiming that it was necessary to halt or reduce the permitted activity to maintain compliance is not a defense.
- (d) - **Duty to Mitigate** The permittee must take all reasonable steps to minimize or prevent any discharge that is in violation of the permit.
- (e) - **Proper Operation and Maintenance** The permittee must properly operate and maintain all facilities; this includes maintaining back-up and auxiliary facilities.
- (f) - **Permit Actions** A permit may be modified or changed for cause.
- (g) - **Property rights.** This permit does not convey property rights... or any exclusive privilege.
- (h) - **Duty to Provide Information** The permittee must provide information to the Director within a reasonable amount of time.
- (i) - **Inspection and Entry** The permittee must allow entry and inspection of facilities by an authorized representative upon presentation of credentials.
- (j) - **Monitoring and Records** Monitoring must be done according to procedures under 40 CFR part 136. Records, with some exemptions, must be kept for three years.
- (k) - **Signatories.** All applications, reports, or information submitted to the Director must be signed and certified (See 122.22)
- (l) - **Reporting Requirements** The permittee must report to the Director any planned changes, anticipated non-compliance, transfers, monitoring reports, compliance schedules, twenty-four hour reporting (any noncompliance that may endanger health), other noncompliance, and other information.
- (m) - **Bypass** A bypass is prohibited unless it is unavoidable to prevent loss of life, personal injury, or severe property damage and there is no feasible alternative. A bypass must not exceed limitations and must be essential for maintenance. Notice must be provided of an anticipated bypass.
- (n) - **Upset** The conditions necessary for demonstration of an upset include: identification of the occurrence and cause, proof that the facility was operating properly, submission of notice within 24 hours of it happening, and compliance with remedial measures. In any enforcement proceeding, the burden of proof of the upset is on the permittee.

State Regulation/Law Citation:

Comments:

16. 40 CFR §122.42 - Additional Conditions Applicable to Specified Categories

Description:

- \$ There are additional reporting requirements for existing manufacturing, commercial, mining, and silvicultural dischargers.
- \$ POTWs must report any new introduction or change in volume of pollutants.
- \$ The operator of a large or medium municipal separate storm sewer system must submit an annual report to the Director.
- \$ Compliance with the conditions of the permit for storm water discharges must be achieved within three years of its issuance.

State Regulation/Law Citation:

Comments:

17. 40 CFR §122.43 - Establishing Permit Conditions

Description:

- \$ The Director may establish permit conditions on a case-by-case basis to assure compliance with all requirements of the CWA.
All permit conditions must be incorporated either expressly or by reference.

State Regulation/Law Citation:

Comments:

18. 40 CFR §122.44 - Establishing Limitations, Standards, and Other Permit Conditions

Description:

- \$ Establishes basic requirements for permit content, technology-based effluent limitations and other standards, reopener provisions, notification and monitoring provisions, requirements for pretreatment programs, BMPs, a list the pollutants subject to 24-hour reporting.
- \$ The requirements that a permittee must maintain effluent limits in an interim permit that are as stringent as the final limits in the previous permit, with some exceptions (anti-backsliding).
- \$ Options for regulating users of privately-owned treatments works
- \$ Permit conditions related to Coast Guard requirements and to prevent substantial impairment of navigation or anchorage.
- \$ For storm water discharges associated with small construction activity, appropriate local erosion and sediment control programs (including incorporation of qualifying state, tribal or local erosion and sediment control programs) and pollution prevention plans

Note: Technology-based standards (Subchapter N of 40 CFR) are effective as they are adopted by EPA, and states must be able to implement them in permits under this section. Also see 123.25(a)(37) Please describe the state's mechanism for adopting, or otherwise implementing new or revised federally promulgated effluent guidelines.

State Regulation/Law Citation:

Comments:

19. 40 CFR §122.44(d) - Water Quality-Based Effluent Limitations

Description:

- \$ There must be water quality-based effluent limits if the discharge will cause or have the reasonable potential to cause or contribute to an instream excursion above a narrative or numeric criteria within a State water quality standard.
- \$ When determining whether a discharge causes, or has the reasonable potential to cause or contribute to an in-stream excursion..., the permitting authority will use procedures which account for existing controls on point and nonpoint sources of pollution (among other factors).
- \$ When the permitting authority determines that a discharge causes an in-stream excursion above the numeric criterion for whole effluent toxicity, the permit must contain effluent limits for whole effluent toxicity.
- \$ Water quality based effluent limits (WQBELs) must derive from and comply with state water quality standards. WQBELs must also be consistent with the requirements and assumptions of any approved WLA (or TMDL).

Please cite the existence of any specific reasonable potential procedures (i.e., procedures for determining when a water quality based permit limits is needed).

Note to reviewers of Great Lakes States: All 8 Great Lakes States underwent program modification to incorporate various provisions related to water quality permitting in 1999-2000. Special regulations applied to these program modifications. We will assume this aspect of a State's program needs no further review unless the State has revised regulations that implement the NPDES provisions in 40 CFR part 132, App. F since the program modifications in 1999-2000. Please note if there have been revisions.

State Regulation/Law Citation:

Comments:

19. 40 CFR §122.45 - Calculating Permit Conditions

Description:

- \$ Effluent limits must be established for each outfall of the permitted facility.
- \$ Establishes requirement for expression and calculation of limits, e.g., production-production based limits, expressing metals limits as "total recoverable metals," when mass limits are required
- \$ For continuous discharges, requires maximum daily and average monthly discharges limits for non-POTWs and average weekly and average monthly discharges for POTWs
- \$ Describes when net limits are allowed for technology-based limits
- \$ Describes when limits on internal wastestreams are appropriate

State Regulation/Law Citation:

Comments:

20. 40 CFR §122.47 (a) - General Schedules of Compliance

Description:

- \$ The permit may contain a schedule of compliance leading to compliance with the CWA and regulations. The schedule must require compliance as soon as possible, but not later than the applicable statutory deadline under the CWA.
- \$ If a permit establishes a schedule of compliance which exceeds one year from the date of permit issuance, the schedule will have interim requirements with dates for achievement and a requirement for submittal of reports within 14 days after the interim date.
- \$ An alternative to schedules of compliance would be to cease regulated activity.

State Regulation/Law Citation:

Comments:

21. 40 CFR §122.48 - Requirements for Recording and Reporting of Monitoring Results

Description:

- \$ The permit must have requirements for the use of monitoring equipment, the monitoring subject, and reporting requirements.

State Regulation/Law Citation:

Comments:

22. 40 CFR §122.50 - Disposal into Wells, POTWs or by Land Application

Description:

§ Specifies how limits must be calculated when part of a discharger's effluent is discharged to wells, POTWs, or by land application

State Regulation/Law Citation:

Comments:

23. 40 CFR §122.61 - Permit Transfers

Description:

§ Requires permit transfer by permit modification, unless the conditions for automatic transfers have been satisfied

State Regulation/Law Citation:

Comments:

24. 40 CFR §122.62 - Permit Modification

Description:

§ The Director may modify a permit given the following causes: alterations in the facility or its activities, there is new information about the facility (from an inspection or self-reporting), and/or there are new regulations.

§ The Director may modify or revoke and reissue a permit given the following causes: there is cause for termination (Section 122.64), or the director receives notification about a proposed transfer of the permit.

State Regulation/Law Citation:

Comments:

25. 40 CFR §122.63 - Minor Modification of Permits

Description:

§ Minor modifications to permits may be made for such reasons as correcting typographical errors, requiring more frequent monitoring, changing an interim compliance date, etc., upon the consent of the permittee.

State Regulation/Law Citation:

Comments:

E. Programmatic Elements

1. 40 CFR §123.25 (c) - Conflict of Interest

Description:

§ State NPDES programs must ensure that any board or body which approves all or portions of permits does not have members who receive, or have during the previous 2 years received, a significant portion of income (10% of income or greater) directly or indirectly from permit holders or applicants for a permit.

Note to reviewers: States may have a statutory or regulatory provision addressing conflict of interest. If not, other program documents should explain how this requirement is met.

State Regulation/Law Citation:

Comments:

2. 40 CFR §123.26 - Compliance and Inspection Procedures ¹

Description:

(c) States must have authority to enter any site or premises subject to regulation or in which records relevant to the program operation are kept in order to copy any records, inspect, monitor, or otherwise investigate compliance with the State program....

State Regulation/Law Citation:

Comments:

3. 40 CFR §123.27 - Requirements for Enforcement Authority

Description:

§ Remedies are available to the State for violations of the State program by any person (including governmental entities), including:

- civil penalties assessable in at least the amount of \$5,000 a day for each violation of any NPDES permit condition; any NPDES filing requirement; and duty to allow or carry out inspection, entry or monitoring activities; or, any regulations or orders issued by the State Director

- criminal fines assessable in at least the amount of \$10,000 a day recoverable against any person for willful or negligent violations of any applicable standard or limitation; any NPDES permit condition, or any NPDES filing requirement

- criminal fines assessable in at the amount of \$5,000 for each instance of violation recoverable against any person who knowingly makes any false statement, representation or certification in any NPDES permit in any notice or report required by an NPDES permit or who knowingly renders inaccurate any monitoring device or method required to be maintained by the Director.

The State will allow for public participation and allow 30 days for public comment on any proposed settlement.

Note to reviewers: See additional detail on required enforcement authorities at 123.27

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State Regulation/Law Citation:

Comments:

F. Permitting Procedures

¹§123.26 contains numerous requirements for a state compliance monitoring program. The ability to inspect and independently evaluate compliance must be captured in the state's legal authorities. The other requirements may be in other program documents (e.g., program description, procedural manuals, etc.)

1. 40 CFR §125.3(a) - Permit Applications

Description:

§ Specifies minimum application procedures

State Regulation/Law Citation:

Comments:

2. 40 CFR §124.5 (a), (b), (c), (d) - Modification, Revocation and Reissuance, or Termination of Permits

Description:

§ (a) Permits may be modified, revoked and reissued, or terminated either at the request of any interested person (including the permittee) or upon the Director's initiative.

§ (b) If the Director determines that the request is not justified, the director will send a letter denying the request.

§ (c) If the Director is going to modify or revoke and reissue, he or she will prepare a draft permit under the different parts of the law.

§ (d) If the Director is going to terminate the permit, he or she will issue a notice of intent to terminate.

State Regulation/Law Citation:

Comments:

3. 40 CFR §124.6 - Draft Permits

Description:

§ Once an application is complete, the Director will decide whether to prepare a draft permit or to deny the application. If it is a denial, the Director will issue a notice of intent to deny. If it is an approval, a draft permit must be created.

State Regulation/Law Citation:

Comments:

4. 40 CFR §§124.8 and 124.56 - Fact Sheets

Description

- § Requires facts sheets for major permits, permits that incorporate a variance, permits with land application plans for sewage sludge [for states with approved sludge programs only], and permits subject of wide-spread public interest or raises major issues
- § In general, fact sheets must explain the facts and significant factual, legal, methodological and policy questions considered in preparing the draft permit. Specifically, the fact sheet must explain
- type of facility or activity covered by permit
 - type and quality of pollutants being regulated
 - brief summary of basis for permit limits
 - rationale for variance approval or denial
 - justification for waiver of application requirements under 122.21(j) or (q)
 - calculation of specific effluent limitations (122.56(a))
 - calculation of limits and waivers pursuant to specific regulations (122.56(b)-(e))

State Regulation/Law Citation:

Comments:

5. 40 CFR §124.10 - Public Notice of Permit Actions and Public Comment Period

Description:

- § There are conditions when the Director will give public notice. For draft permits, there needs to be at least 30 days for public comment and notice of public hearings needs to be given at least 30 days in advance.

State Regulation/Law Citation:

Comments:

6. 40 CFR §124.11 - Public Comments and Requests for Public Hearings

Description:

- § A State must allow any interested person to submit written comments and to request a public hearing if one is not already scheduled.

State Regulation/Law Citation:

Comments:

7. 40 CFR §124.12 (a) - Public Hearings

Description:

§ The Director will have public hearings at his or her discretion or when there is a significant degree of public interest.

State Regulation/Law Citation:

Comments:

8. 40 CFR §124.17(a), (c) - Response to Comments

Description:

§ The Director must issue a response to comments and it will be available to the public.

State Regulation/Law Citation:

Comments:

9. 40 CFR §124.59 - Conditions Requested by the Corps of Engineers

Description:

§ If the Corps of Engineers notifies the Director during the comment period that anchorage and navigation of the waters of the U. S. would be impaired, the permit will be denied. If the Corps notifies the Director that special conditions in the permit would avoid impairment, the conditions will be included.

State Regulation/Law Citation:

Comments:

10. 40 CFR §124.62 - Decisions on Variances

Description:

- § State Directors may grant or deny variances based on:
 - CWA 301(i) extensions
 - CWA 301(k) innovative technologies (after consultation with RA)
 - CWA 316(a) thermal variances
- § State Directors may deny, forward to RA with a written concurrence, or submit to EPA without recommendation a completed request for:
 - CWA 301(c) economic variance
 - CWA 302(b)(2) water quality related effluent limitations
- § State Directors may deny or forward to the Administrator (or delegatee) with a written concurrence a completed request for:
 - FDF variance from technology-based limits
 - CWA 301(g) variance

Note to reviewers: Please specify if the State has variances that do not fall into the above categories

State Regulation/Law Citation:

Comments:

11. 40 CFR §123.30 Judicial review of approval or denial of permits

Description:

- § States shall provide for public participation in the permitting process through opportunity for judicial review. Generally, states should provide for standing to the same extent as §509 of the CWA .
- § A State will not meet this standard if it narrowly restricts the class of persons who may challenge the approval or denial of permits.

Note to Reviewers: CWA SEC. 509 provides that: Review... may be had by any interested person... within 120 days from the date of such determination, approval, promulgation, issuance or denial, or after such date only if such application is based solely on grounds which arose after such 120th day. [509(b)(1) amended by PL 100-4]

State Regulation/Law Citation:

Comments:

G. Technology-Based and other Technical Standards

1. 40 CFR §125 Subpart A - Technology-Based Treatment Requirements

Description:

- § The minimum levels of control that must be imposed in a permit, with three year deadlines for implementation after limits are set.
- § For dischargers other than POTWs, effluent limitations should have the best practicable control technology currently available (BPT), the best conventional pollutant control technology (BCT), the best available technology economically achievable (BAT), and other control mechanisms for the pollutants not covered under BPT, BCT or BAT.
- § Statutory variances and extensions may be granted under the different sections of the code (122.21, 124.53).
- § Case-by-case limitations may be set after consideration of factors for BPT, BCT, and BAT requirements. The Director may set stricter limits than BCTs under certain conditions.

State Regulation/Law Citation:

Comments:

2. 40 CFR Part 125, Subpart D Fundamentally Different Factors

Description

- § Establishes the criteria, standards, and procedures for evaluating requests for alternative limits based on fundamentally different factors than those considered in a federally promulgated effluent guideline.

State Regulation/Law Citation:

Comments:

3. 40 CFR §125 Subpart H - Determining Alternative Effluent Limitations under CWA 316(a)

Description:

- § Early screening of the applications will include a description of the alternative limitation, the method of demonstration of stringency, and the type of data.
- § The Director will notify the Secretary of Commerce and the Secretary of the Interior, and any affected State of the filing of the request and will request recommendations.
- § Less stringent measures than those of applicable standards may be applied so long as the limits will assure the protections of the indigenous shellfish, fish and wildlife. Existing dischargers may base their demonstration upon the absence of prior appreciable harm in lieu of predictive studies.

State Regulation/Law Citation:

Comments:

4. 40 CFR §125 - Subpart I - Cooling Water Intake Structures

Description:

§ Establishes requirements for location, design, construction, and capacity of cooling water intake structures at new facilities based on best technology available for minimizing adverse environmental impact

Note to reviewers: Certain provisions in this Subpart were revised at 68 FR 36749 (June 19, 2003).

State Regulation/Law Citation:

Comments:

5. 40 CFR §133 - Secondary Treatment Standards

Description:

§ Standards are prescribed for the five day measure of the pollutant parameter biochemical oxygen demand, for suspended solids, and for pH. Specific information on levels of effluent quality attainable through the application of secondary or equivalent treatment, with special considerations, is provided.

§ 85 percent removal for BOD

State Regulation/Law Citation:

Comments:

6. 40 CFR Part 129 Toxic Pollutant Effluent Standards

Description:

§ EPA-promulgated standards and prohibition under CWA §307(a) for certain toxic pollutants (Aldrin/Dieldrin, DDT, DDD and DDE, Endrin, Toxaphene, Benzidine, and PCBs)

State Regulation/Law Citation:

Comments:

III. PRETREATMENT PROGRAM

Note to reviewers: A number of NPDES state program do not have approved pretreatment programs (these are readily identifiable). For these, the deficiency is that they don't have pretreatment program approval. Further review is not necessary.

A. General.

1. Was the State's pretreatment program approved without regulations in place?

_____ Yes _____ No

If yes, has the State subsequently adopted regulations for the pretreatment program?

_____ Yes _____ No

Note: Part B should be used to evaluate the adequacy of the State's regulations (e.g., are they up-to-date).

2. Direct Regulation of Indirect Users: States have the option of regulating all indirect dischargers directly instead of requiring POTWs to develop local pretreatment programs. See 403.10(e). Does the state directly regulate all indirect Users?

_____ Yes _____ No

Important Note: When states have opted to directly regulate IUs, they must have the legal authority to implement the requirements at 403.8. This checklist does not cover 403.8. States who require POTWs to have pretreatment programs may still need to regulate IUs in non-pretreatment cities.

B. Required Legal Authorities

1. 40 CFR 403.10(f)(1)(i)

Description:

§ Incorporate POTW pretreatment program requirements into POTW permits and require compliance with those permit conditions

§ Require compliance by Industrial users with Pretreatment Standards.

State Regulation/Law Citation:

Comments:

2. 40 CFR § 403.10(f)(1)(ii)

Description:

Ensure continuing compliance by reviewing self-monitoring report submitted by POTWs and Industrial Users in accordance with 403.12

State Regulation/Law Citation:

Comments:

3. 40 CFR § 403.10(f)(1)(iii)

Description

- § Carry out inspection, surveillance and monitoring procedures to independently determine compliance by POTWs with pretreatment conditions in its NPDES permit
- § Carry out inspection, surveillance and monitoring procedures to independently determine compliance by Industrial users with Pretreatment Standards

State Regulation/Law Citation:

Comments:

4. 40 CFR § 403.10(f)(1)(iv)

Description:

- § Seek civil and criminal penalties and injunctive relief for noncompliance by POTWs with pretreatment conditions in permits
- § Seek civil and criminal penalties and injunctive relief for noncompliance by Industrial Users as set forth in 403.8(f)(1)(vi)²
- § Seek judicial relief against noncompliance by Industrial Users even where the POTW has sought relief (e.g., where the state determines the relief sought by the POTW is inadequate).

State Regulation/Law Citation:

Comments:

² (A) All POTWs shall be able to seek injunctive relief for noncompliance by Industrial Users with Pretreatment Standards and Requirements. All POTWs shall also have authority to seek or assess civil or criminal penalties in at least the amount of \$1,000 a day for each violation by Industrial Users of Pretreatment Standards and Requirements.

(B) Pretreatment requirements which will be enforced through the remedies set forth in paragraph (f)(1)(vi)(A) of this section, will include but not be limited to, the duty to allow or carry out inspections, entry, or monitoring activities; any rules, regulations, or orders issued by the POTW; any requirements set forth in individual control mechanisms issued by the POTW; or any reporting requirements imposed by the POTW or these regulations. The POTW shall have authority and procedures (after informal notice to the discharger) immediately and effectively to halt or prevent any discharge of pollutants to the POTW which reasonably appears to present an imminent endangerment to the health or welfare of persons. The POTW shall also have authority and procedures (which shall include notice to the

5. 40 CFR 403.10(f)(1)(v)

Description

§ Approve and deny requests for approval of POTW pretreatment programs

State Regulation/Law Citation:

Comments:

6. 40 CFR 403.10(f)(1)(vi)

Description:

§ Deny and recommend approval (but not approve) requests for Fundamentally Different Factors variances.

State Regulation/Law Citation:

Comments:

7. 40 CFR 403.10(f)(1)(vii)

Description:

§ Approve and deny requests for “removal credits” in accordance with 403.7, 403.9 and 403.11.

State Regulation/Law Citation:

Comments:

affected industrial users and an opportunity to respond) to halt or prevent any discharge to the POTW which presents or may present an endangerment to the environment or which threatens to interfere with the operation of the POTW.